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NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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APRIL, 2000

47 pp

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QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

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SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Now comes petitioner Kestutis Zadvydas, through undersigned counsel, and pursuant to Supreme Court Rule 15.8, hereby files the following Supplemental Brief in support of his Petition for Writ of Certiorari, which was filed on January 11, 2000. Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals filed August 11, 1999, as to which rehearing was denied on October 13, 1999.

OPINION BELOW

The opinion below is reported at **Zadvydas v. Underdown**, 185 F.3d 279 (5th Cir. 1999). The opinion of the Fifth Circuit is attached as Appendix B to the original Petition for Writ of Certiorari. The order of the Fifth Circuit of October 13, 1999, denying rehearing is attached as Appendix C to the original Petition for Writ of Certiorari.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed on August 11, 1999. Rehearing was denied on October 13, 1999. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

The District Court had jurisdiction of this matter pursuant to Title 28, United States Code, Section 2241. The Court of Appeals exercised jurisdiction over this appeal pursuant to Title 28, United States Code, Section 1291.

SUPPLEMENTAL ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Since the submission of the original Petition for Writ of Certiorari, counsel has become aware of a recently decided case from the United States Court of Appeals for the Ninth Circuit, which directly supports Petitioner's position on Subsidiary Questions 1 and 3 of the Questions Presented in his original Petition. The Ninth Circuit declined to follow the Fifth Circuit by applying the doctrine of constitutional avoidance. This creates a conflict in the Circuits. The Ninth Circuit similarly declined to follow the Tenth Circuit. See **Ma v. Reno**, ___ F.3d ___, 2000 WL 358445 (9th Cir. (Wash.)); **Ho v. Greene**, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb. 29, 2000).

In **Ma**, the United States Court of Appeals for the Ninth Circuit clearly ruled in favor of resident aliens for many of the reasons set forth in petitioner's original writ application.

The court in **Ma** held that:

> Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups.
>
> . . .
>
> Those in the second group "may be detained beyond the removal period" and, if released, shall be subject to the same supervisory

> provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6). [FN12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.
>
> . . .
>
> We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the [90 day] statutory removal period.

Ma, 2000 WL 358445 pp.4,6,7. (Citation omitted).

In clear contrast to **Ma**, the **Ho** court held that the statute unambiguously "expressly allows for continued detention [of resident aliens] beyond the removal period **with no time limit** placed on the duration of such detention." **Ho**, at 1057 (emphasis supplied).

The **Ma** court stated that its views were in accord with a long line of cases involving resident aliens who could not be deported for various reasons, such as the lack of a repatriation agreement, because they were stateless, or for any other reason.

Ma, at p.7. Mr. Zadvydas is stateless and is a resident alien. The Ninth Circuit noted that an earlier immigration statute set no time limits as to the length of detention. That statute was construed to mean that "detention could only continue for a reasonable period." **Ma**. (citing, **Caronica v. Nagle**, 28 F.2d 955 (9th Cir. 1928); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Wolck v. Weedin**, 58 F.2d 928, 930-31 (9th Cir. 1932); **Ross v. Wallis**, 279 F. 401, 403 (2d Cir. 1922)).

In light of **Ma**, **Ho** and the instant matter, a conflict exists in the Circuits as to the constitutional status of resident aliens in relation to excludable aliens.

Unlike the Ninth Circuit, the Fifth and Tenth Circuits ruled that resident aliens were indistinguishable from excludable aliens with respect to indefinite detention. **Ma**, 2000 WL 35445 p.5. Whereas the Ninth Circuit cited numerous decisions of this Court stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission. . . and those who are within the United States after an entry, irrespective of its legality," the other two circuits rejected such a distinction. **Ma**, p.6, quoting **Leng May Ma v. Barber**, 357 U.S. 185 (1958). Instead, the Tenth and Fifth Circuits adopted, verbatim, the INS' novel theory that this Court's

decision in **Shaughnessy v. U.S. ex rel Mezei**, 345 U.S. 206 (1953), applies to resident aliens "because, for constitutional purposes an [resident] alien ordered removed has no further right to be here and therefore stands on essentially the same footing as an excludable alien." **Ma**, at p.6. Clearly, it is the Tenth and Fifth Circuits reliance on **Mezei**, a case dealing solely with an excludable alien, that conflicts with the holding in **Ma**. As the Ninth Circuit recognized, this novel legal theory runs counter to this Court's recognition of a distinction between the two classes of aliens. **Ma**, at pp.5-6. See **Landon v. Plasencia**, 459 U.S. 21, 32 (1982); **Plyler v. Doe**, 457 U.S. 202 (1982); **Matthews v. Diaz**, 426 U.S. 67 (1976); **Leng May Ma v. Barber**, 357 U.S. 185 (1958); **Wong Wing v. United States**, 163 U.S. 228 (1986).

Without resolution of the conflict among the circuits, aliens located in the Fifth and Tenth Circuits will be subjected to indefinite detention awaiting deportation that may never occur. At the same time, resident aliens located in the Ninth Circuit must be released in a reasonable period of time. Constitutional issues should not turn on accidents of geography.

CONCLUSION

For the reasons set forth above, and the reasons set forth in petitioner Zadvydas' original Petition for Writ of Certiorari, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Respectfully submitted this 14th day of April, 2000.

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CERTIFICATE

I hereby certify that a copy of the foregoing notice to continue stay of mandate has been served on the following counsel, at the following addresses, by placing same in the United States mail, postage prepaid, this 14th day of April, 2000.

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KESTUTIS ZADVYDAS,

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versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

1. **Ma v. Reno**, ___ F.3d ___, 2000 WL 358445 (9th Cir. (Wash.))

2. **Ho v. Greene**, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb.29, 2000)

Kim Ho MA, Petitioner-Appellee,
v.
Janet RENO, Attorney General; and Robert C. Smith, District Director of the Immigration and Naturalization Service, Seattle, Washington, Respondents-Appellants.

No. 99-35976.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 14, 2000

Filed April 10, 2000

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Carolyn M. Wiggin, Assistant Federal Public Defender, Sacramento, CA, for amicus Federal Public Defender.

Frank Tse, San Franciso, CA, for amicus Southeast Asia Resource Action Center.

Appeal from the United States District Court for the Western District of Washington. Robert S. Lasnik, District Judge, Presiding

Before: Stephen Reinhardt, David R. Thompson, and T.G. Nelson, Circuit Judges.

REINHARDT, Circuit Judge:

*1 Petitioner Kim Ho Ma is an alien who left his native land, Cambodia, as a refugee at the age of two and has resided in the United States as a legal permanent resident since he was six. At the age of seventeen he was involved in a gang-related shooting, and was convicted of manslaughter. After completing his prison sentence some two years later, he was taken into INS custody and ordered removed because of that conviction. However, the INS has been unable to remove him, and hundreds of others like him, because Cambodia does not have a repatriation agreement with the United States and therefore will not permit Ma's return. [FN1] The question before us is whether, in light of the absence of such an agreement, the Attorney General has the legal authority to hold Ma, who is now twenty two, in detention indefinitely, perhaps for the remainder of his life.

Ma challenged his detention by filing a petition for habeas corpus, under 28 U.S.C. § 2241, in the District Court for the Western District of Washington. That court ruled that Ma's continued detention violates his substantive due process rights under the Fifth Amendment. [FN2] Respondents, the Immigration and Naturalization Service, Janet Reno (as Attorney General), and Robert Coleman (as INS Acting District Director in Seattle) (hereinafter collectively referred to as "INS") appeal the district court's decision releasing Ma from INS custody. We have jurisdiction [FN3] and affirm, but on a different basis.

We hold that the INS lacks authority under the immigration laws, and in particular under 8 U.S.C. § 1231(a)(6), to detain an alien who has entered the United States for more than a reasonable time beyond the normal ninety day statutory period authorized for removal. More specifically, in cases like Ma's, in which there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future, we hold that it may not detain the alien beyond that statutory removal period. Because we construe the statute as not permitting the indefinite detention of aliens like Ma, we need not decide the substantial constitutional questions raised by the INS's indefinite detention policy.

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I.

*2 Petitioner Kim Ho Ma's family fled Cambodia in 1979 and took Ma, who was then two years old, with them. After spending over five years in refugee camps, Ma's family lawfully entered the United States in 1985 as refugees. Ma's status was adjusted to that of a lawful permanent resident in 1987. In 1996, he was convicted, by a jury, of first degree manslaughter following a gang-related shooting. He was sentenced to 38 months in prison, but eventually served only 26 after receiving credit for good behavior. He was tried as an adult, although he was only seventeen years of age at the time of the crime. Although the INS repeatedly refers to Ma's criminal record, this was his only criminal conviction.

Ma's conviction made him removable as an alien convicted of certain crimes under 8 U.S.C. § 1227(a)(2). Because he was released by the state authorities after April 1, 1997, the INS's authority to take him into custody was governed by the permanent custody rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (codified at 8 U.S.C. § 1231). The INS took Ma into custody following his release from prison and initiated removal proceedings against him. An immigration judge found Ma removable, and furthermore found him ineligible for asylum or withholding of deportation because of his conviction. Ma appealed this ruling to the Board of Immigration Appeals (BIA). The BIA affirmed the immigration judge's decision. Although Ma's order of removal became final on October 26, 1998, the INS could not remove him within the ninety day period during which it is authorized to do so because the United States had, and still has, no repatriation agreement with Cambodia. As a result, Ma remained in detention until he filed this petition for a writ of habeas corpus, which was granted by the district court on September 29, 1999. He is now twenty-two and has been in custody (and, but for the district court's decision, would have been incarcerated) for nearly five years, although his sentence accounts for only a little over two years of that period.

In addition to filing the habeas petition we now review, Ma made several other attempts to secure his release. During the pendency of the proceedings before the immigration judge and the BIA, Ma filed two motions to be released on bond--in October and December 1997. In both instances an immigration judge denied Ma's requests, finding, based solely on the offense he committed at the age of seventeen, that although he was not a flight risk, he was a danger to the community.

In May 1999, over six months after Ma's final removal order (and after his habeas petition was filed), the INS, by letter, requested travel documents for Ma from the Cambodian government. [FN4] The next day, the INS conducted the "ninety day" custody review, as provided for in its regulations, to determine if Ma should be released on bond. [FN5] An INS officer prepared a report after interviewing Ma and reviewing letters and other materials submitted by his family and friends. The officer's report stated that Ma's family was "very supportive," and that if Ma was released he would be able to assist his handicapped 71 year old father in everyday activities. The report also stated that Ma constantly communicates with his younger brother to assure that his brother "does not follow in his footsteps." In addition, the report noted that Ma's older brother runs his own business and would employ Ma if he were released from custody. A deputy district director then reviewed the INS officer's report and issued a decision denying Ma's release. The decision was sent to Ma by means of a form letter that stated that the deputy director made his decision after considering a set of factors set out in INS regulations; [FN6] however the letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release. The letter added that "there is no appeal from this decision." [FN7]

On September 30, 1999, pursuant to additional internal regulations, the INS again reviewed its decision to continue detaining Ma. [FN8] Once again, INS officials found that Ma should remain in detention, based on the seriousness of his conviction and also on the ground of his threatened participation in a hunger strike while in custody. The reviewers stated that they were unable to conclude that Ma would "remain non-violent" and abide by the terms of his release. These decisions were made despite abundant information in the administrative record about Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior. Upon reviewing Ma's habeas petition, the district court ruled that Ma's detention was unconstitutional on "substantive due process" grounds and ordered

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him released pending the outcome of this appeal. This court and the Supreme Court denied the INS's requests for a stay of the district court's release order. [FN9] The INS now appeals the district court's decision granting Ma's habeas corpus petition.

II.

*3 Although the bulk of the parties' arguments, as well as the district court's ruling, address the constitutionality of the INS's detention policy, we must first determine whether Congress provided the INS with the authority to detain Ma indefinitely, as the Attorney General contends.

In general, after an alien is found removable, the Attorney General is required to remove that alien within ninety days after the removal order becomes administratively final. [FN10] Many aliens, however, cannot be removed within the ninety day period for various reasons. First, some individual cases may simply require more time for processing. Second, there are cases involving aliens who have been ordered removed to countries with whom the United States does not have a repatriation agreement, such as Cambodia, Laos, and Vietnam. Finally, there may be those aliens whose countries refuse to take them for other reasons, and yet others who may be effectively "stateless" because of their race and/or place of birth. [FN11] Ma falls in the second category.

Under the statute, aliens who cannot be removed at the end of ninety days fall into two groups. Those in the first group must be released subject to supervisory regulations that require them, among other things, to appear regularly before an immigration officer, provide information to that official, notify INS of any change in their employment or residence within 48 hours, submit to medical and psychiatric testing, and comply with substantial restrictions on their travel. 8 U.S.C. § 1231(a)(3). Those in the second group "may be detained beyond the removal period " and, if released, shall be subject to the same supervisory provisions applicable to aliens in the first group. 8 U.S.C. § 1231(a)(6). [FN12] Aliens in the second group include, among others, persons removable because of criminal convictions (such as drug offenses, certain crimes of moral turpitude, "aggravated felonies," firearms offenses, and various other crimes). 8 U.S.C. § 1227(a)(2). Ma's criminal conviction places him in the second group.

INS argues that its authority to "detain beyond the removal period" gives it the authority to detain indefinitely aliens who fall in the second group and who cannot be removed in the reasonably foreseeable future. [FN13] Ma argues the opposite--that the INS's authority to detain aliens beyond the removal period does not extend to cases in which removal is not likely in the reasonably foreseeable future. On its face, the statute's text compels neither interpretation: while § 1231(a)(6) allows for the detention of group two aliens "beyond" ninety days, it is silent about how long beyond the ninety day period such detention is authorized. Thus, any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be "indefinitely," "for a reasonable time," or some other temporal measure.

*4 We hold that Congress did not grant the INS authority to detain indefinitely aliens who, like Ma, have entered the United States and cannot be removed to their native land pursuant to a repatriation agreement. To the contrary, we construe the statute as providing the INS with authority to detain aliens only for a reasonable time beyond the statutory removal period. In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, we conclude that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

We adopt our construction of the statute for several reasons. First, and most important, the result we reach allows us to avoid deciding whether or not INS's indefinite detention policy violates the due process guarantees of the Fifth Amendment. Second, our reading is the most reasonable one--it better comports with the language of the statute and permits us to avoid assuming that Congress intended a result as harsh as indefinite detention in the absence of any clear statement to that effect. Third, reading an implicit "reasonable time" limitation into the statute is consistent with our case law interpreting a similar provision in a prior

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immigration statute. Finally, the interpretation we adopt is more consonant with international law. [FN14]

III.

The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); United States v. Jin Fuey Moy, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916); see also United States v. Bulacan, 156 F.3d 963, 974 (9th Cir.1998). We have referred to this rule as a "paramount principle of judicial restraint." United States v. Restrepo, 946 F.2d 654, 673 (9th Cir.1991).

In the immigration context, courts have often read limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems. For example, in United States v. Witkovich, 353 U.S. 194, 199, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957), the Court read a limitation into a statute authorizing the INS to ask questions and receive information from deportable aliens within the United States. Because constitutional problems would have arisen if the statute were read as penalizing aliens who refused to answer questions that were irrelevant to any legitimate governmental purpose, the Court chose to read a limitation into the statute. Witkovich, 353 U.S. at 199.

*5 We followed Witkovich in Romero v. INS, 39 F.3d 977 (9th Cir.1994), which involved an alien who had lied to an INS official, thereby rendering her deportable because she violated a condition of her immigration status. The condition required that she answer truthfully all questions put to her by INS officials. However, the questions she did not answer truthfully were irrelevant to her visa status. Although the provision at issue stated that aliens who failed to comply with the conditions of their status were deportable, without defining those conditions in any way, we read into the statute a limitation on the kinds of conditions that the Attorney General could place on aliens. Id. at 979-80. Invoking the canon of constitutional avoidance, we concluded that the alien could not be required to answer questions having nothing to do with her visa status. Id. at 981; cf. Jean v. Nelson, 472 U.S. 846, 854-56, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (holding that immigration parole regulation does not permit race discrimination in order to avoid reaching constitutional question); Tashima v. Administrative Office of the U.S. Courts, 967 F.2d 1264, 1271 (9th Cir.1992) (interpreting statute stating that Office "may" provide representation to judges as requiring interpretation based upon criteria not listed in the statute, in order to avoid constitutional problems).

Of course, as the Supreme Court has noted repeatedly when formulating the canon of constitutional avoidance, the rule applies when the constitutional issue at hand is a substantial one. [FN15] The INS contends that the answer to Ma's constitutional challenge is dictated by a straightforward application of our en banc decision in Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.1995) (en banc), and the Supreme Court's decision in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). [FN16] If this were correct, we would not need to invoke the canon of constitutional avoidance. However, those cases deal with a significantly different problem from the one we avoid here. Both Mezei and Barrera- Echavarria involved excludable aliens rather than aliens who have already entered the United States. As a result, the constitutional analysis in both cases rests on a doctrine known as the "entry fiction," which authorizes the courts to treat an alien in exclusion proceedings as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States. Both decisions were entirely explicit in their reasoning on this point. In Mezei, the Court relied on the entry fiction (that an excludable alien has not entered the United States) in holding that an excludable alien is not entitled to procedural due process:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned....

*6 Neither respondent's harborage on Ellis Island

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nor his prior residence here transforms this into something other than an exclusion proceeding.

Id. at 212-13 (internal citations omitted). While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights. [FN17]

We followed Mezei in Barrera-Echavarria, which involved a Mariel Cuban who was detained while excluded from the U.S. [FN18] After describing the petitioner's argument and noting our disagreement, we began our analysis by relying on the historic distinction between excludable and resident aliens:

> The Supreme Court has consistently recognized that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission ... and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category.

Barrera-Echavarria, 44 F.3d at 1448 (quotations omitted, alteration in original). We also quoted a passage from Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Barrera- Echavarria, 44 F.3d at 1449. [FN19] Shortly after this quotation, we noted that

> Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. [citing United States v. Verdugo-Urquidez and Johnson v. Eisentrager] Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.

Barrera-Echavarria, 44 F.3d at 1450.

Thus, it is not surprising that Barrera-Echavarria upheld as constitutional the long-term detention of aliens who had not entered the United States, legally or illegally (although they had been paroled into this country). As we stated in that case, it is "not settled" that excludable aliens have any constitutional rights at all, id. at 1449, so it is clear that they cannot prevail where the government refuses to admit them. [FN20] In contrast to Mezei and Barrera-Echavarria, numerous cases establish that once an alien has "entered" U.S. territory, legally or illegally, he or she has constitutional rights, including Fifth Amendment rights. See, e.g., Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (stating that "[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)); Leng May Ma v. Barber, 357 U.S. 185, 187, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (stating that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry' "); cf. Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that illegal alien children have constitutional right to education). [FN21] Unlike the petitioners in Mezei and Barrera-Echavarria, Ma was admitted to and entered the United States as a refugee when he was a child, and has lived here ever since. He does not seek to "force us to admit him." Mezei, 345 U.S. at 210. The cases involving indefinite detention of excludable aliens simply do not support the constitutionality of indefinite detention of aliens who have entered the United States. To the contrary, our case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the Fifth Amendment. [FN22]

The INS also argues that Barrera-Echavarria and Mezei control the result here because, for constitutional purposes, an alien ordered removed has no further right to be here and therefore stands on essentially the same footing as an excludable alien. [FN23] While this novel theory would dispose of the constitutional question raised by indefinite detention of such resident aliens, we cannot easily reconcile it with controlling case law. In particular, the INS's position appears to be clearly inconsistent

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with the Supreme Court's holding in Wong Wing that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Although the INS argues that Wong Wing establishes only the proposition that irrational abuses against aliens who have been ordered deported are unjustified, Wong Wing makes clear that Congress deliberately created the hard labor policy "to promote its policy in respect to Chinese persons" (presumably by creating deterrence and encouraging voluntary departure). Wong Wing, 163 U.S. at 235, 237. The Court said nothing about "irrationality," only unconstitutionality. In short, it unanimously struck down, on Fifth Amendment grounds, Congress' policy with respect to aliens who had been ordered deported even though that policy was passed in furtherance of legitimate immigration goals. See also Landon v. Plasencia, 459 U.S. 21, 32- 34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (holding that resident alien has due process rights in exclusion proceedings because her "constitutional status" is greater than that of a first-time entrant); Johnson v. Eisentrager, 339 U.S. 763, 771, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (holding that the Fifth Amendment grants rights to aliens within the territorial jurisdiction of the U.S., but not to those outside the territory). In order to adopt the INS's approach here, we would have to reconcile Wong Wing, which affords constitutional protection to aliens who have been ordered deported, with the INS's suggested rule--which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection. That would be a daunting, if not impossible, task. [FN24]

*7 It is clear that the INS's effort to extend exclusion law to aliens who have entered the United States but have been ordered removed raises a substantial constitutional question, at the very least. Even if we were to agree with the Fifth Circuit's constitutional holding--and we do not by any means suggest that we do--we would first be required to answer that question. As we may avoid doing so by giving the statute a construction that does not require us to undertake any constitutional inquiry, we follow that course here.

We believe the construction of § 1231(a)(6) we adopt--that the INS may detain aliens who have entered the country but have been ordered removed only for "a reasonable time" beyond the ninety day statutory removal period, and specifically, that such aliens may not be detained beyond that statutory removal period if there is no reasonable likelihood that their country of origin will permit their return in the reasonably foreseeable future--to be the most plausible reading of the statute. However, we note that, in order to avoid the substantial constitutional concerns presented by the INS's interpretation, we could adopt a strained construction of the statute, one that would not otherwise constitute sound statutory construction. As one of our learned colleagues recently explained,

> *8 [S]tatutory construction and constitutional narrowing ... are, in fact, very different animals.... Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 652-654, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). In performing the former task we may not add anything to the statute that is not already there ... in performing the latter function, we must do precisely that.... In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected.

United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n. 6 (9th Cir.) (Kozinski, J., dissenting), rev'd 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). In reversing the majority, the Supreme Court endorsed our dissenting colleague's approach, holding that a statute should be construed to avoid constitutional problems so long as the saving construction is not "plainly contrary to the intent of Congress." 513 U.S. at 78. The discussion which follows will make clear that the construction we adopt is by no means plainly contrary to Congress's intent, but is instead the most reasonable interpretation of the statute.

IV.

The interpretation we give section 1231(a)(6) is clearly the most reasonable one. The provision that the INS may hold individuals "beyond" a specified time demonstrates Congress's intent that the otherwise applicable time limit not be deemed absolute in all cases, and that the agency have some

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flexibility in instances in which additional time may be useful. It does not demonstrate an intent to give the INS any greater authority than that--and certainly not an intent to permit the agency to hold people in detention for the remainder of their lives. Such is surely the case with respect to aliens who have entered the country and are generally entitled to the protections of our Constitution. It would indeed be surprising were Congress to attempt to authorize permanent or indefinite detention of such persons simply by providing that they may be held beyond a ninety day period. Some greater degree of specificity or demonstration of Congressional intent would be necessary before we would conclude that a statute had granted the INS so sweeping a power with regard to persons who are generally subject to the protections of the Constitution. We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute. [FN25]

To sustain the INS' indefinite detention theory we would be required to read far more ifito the statute than its language implies. In the simplest terms, to say that the INS may hold persons beyond a particular date does not answer the question "for how long?". The proper reading, we conclude, is that Congress intended only that the short statutory period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose--the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens. Because, here, there is no repatriation agreement and no demonstration of a reasonable likelihood that one will be entered into in the near future, we believe it to be not only the prudent but the correct interpretation of the statute to hold that Ma and others similarly situated aliens must be released, under supervision, at the end of the statutory removal period. 8 U.S.C. § 1231(a)(1)(A).

V.

*9 Our conclusion that a "reasonable time" limitation is implicit in the statute is supported by a venerable line of Ninth Circuit cases that held that a predecessor provision must be construed as allowing only for detention "reasonably" beyond the removal period.

Prior to 1952, the detention of aliens pending deportation was governed by the Immigration Act of 1917. That statute set no time limit to accomplish a deportation. The Act provided simply that deportable aliens should be "taken into custody and deported." [FN26] Then, just as now, there were cases involving aliens who could not be deported for various reasons--because the U.S. had no repatriation agreement with their country, because their country would not take them back, or because they were stateless. In several cases, this court held that while the deportation order would remain valid indefinitely, detention was justified only for a reasonable period. For example, in Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928), the alien challenged an order mandating his deportation to Greece on the ground that he was a Macedonian citizen, not a Greek citizen. Id. at 956. The court upheld the order, holding that the statute allowed for deportation to Greece. The court held that the Secretary of Labor had broad discretion to find an appropriate country of deportation, but added that "the utmost the courts can or will do is to discharge the appellant from further imprisonment if the government fails to execute the order of deportation within a reasonable time." Id. at 957; see also Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir.1931) (upholding deportation order to Russia (but not to China) and holding that petitioner must be released if he could not be deported to Russia); Wolck v. Weedin, 58 F.2d 928, 930-31 (9th Cir.1932) (upholding deportation order, but ruling, consistent with administrative practice, that alien should be released if deportation could not be effected within a reasonable time). See also United States ex rel. Ross v. Wallis, 279 F. 401, 403 (2d Cir.1922) (requiring release if deportation could not be effected within reasonable period). [FN27]

We recognized the continuing vitality of this rule in a case applying the 1917 Act that we decided in 1954. Spector v. Landon, 209 F.2d 481 (9th Cir.1954). In Spector, the petitioner was an alien who had been ordered deported in 1930, almost a quarter of a century earlier, and had been out on bond for most of the intervening period, but whose deportation the government had been unable to

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accomplish for various diplomatic reasons. Id. at 482. He argued that as a result of the passage of time the deportation order was no longer valid. We rejected this contention, stating that

> *10 No cases have been found by counsel holding that a deportation warrant becomes invalid or unenforceable through mere lapse of time.... There are a number of decisions in habeas corpus to the effect that the right to hold the alien in custody under a deportation warrant persists for no more than a reasonable period. But such holdings lend no color to the contention made here.

Id. (emphasis added) (citations omitted). Thus, even as we denied Spector's claim, we recognized that the 1917 Act did not authorize indefinite detention pending deportation even though the statute did not, by its terms, place any temporal limit on the government's authority; we read the statute as containing an implicit provision that detention was authorized only for a "reasonable period."

While these older cases did not interpret a statute exactly like the one we consider today, because the 1917 Act made no distinction between aliens whose release following the removal period was required and aliens who could be detained following that period, both the 1917 statute and the current law provide for custody pending deportation and set forth no specific time limitations as to the period of detention. Although these older cases do not make their reasoning entirely explicit, they appear to rely on the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention. That principle seems as valid today as it was under the 1917 Act. We too are faced with a statute that does not contain an express statutory proscription against release. Like the courts interpreting the 1917 Act, we assume that the statute implicitly provides for a reasonable limitation on the length of detention. In doing so, we refuse to presume that Congress authorized the indefinite detention of resident aliens long after they have finished serving their sentence merely because their country does not have a repatriation agreement with the United States.

VI.

In interpreting the statute to include a reasonable time limitation, we are also influenced by amicus curiae Human Rights Watch's argument that we should apply the well-established Charming Betsy rule of statutory construction which requires that we generally construe Congressional legislation to avoid violating international law. Weinberger v. Rossi, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) (citing Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-118, 2 L.Ed. 208 (1804)). We have reaffirmed this rule on several occasions. In United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir.1990), we explained that we adhere to this principle "out of respect for other nations." Id. at 1069 (citing Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir.1984)); see also In re Simon, 153 F.3d 991, 998 (9th Cir.1998).

We recently recognized that "a clear international prohibition" exists against prolonged and arbitrary detention. Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir.1998). [FN28] Furthermore, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, see 138 Cong. Rec. S4781-84 (Apr. 2, 1992), provides that "[n]o one shall be subjected to arbitrary arrest and detention." See International Covenant on Civil and Political Rights, opened for signature, Dec. 19, 1966, 999 U.N.T.S. 171, 21 U.N. GAOR Supp. (No. 16) at 54, entered into force Mar. 23, 1976, at Art. 9(1); see also Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) (holding that ambiguous Congressional action should not be construed to abrogate a treaty).

*11 In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law. In Martinez, 141 F.3d 1373, we expressed our approval of a district court decision in this circuit holding that "individuals imprisoned for years without being charged were arbitrarily detained" in violation of international law, id. at 1384 (citing Forti v. Suarez-Mason, 672 F.Supp. 1531, 1541 (N.D.Cal.1987)). Given the strength of the rule of international law, our construction of the statute renders it consistent with the Charming Betsy rule.

Conclusion.

In the face of these compelling statutory arguments,

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we do not read § 1231(a)(6) as authorizing the indefinite detention of removable aliens. Rather, we hold that the statute authorizes the Attorney General to detain removable aliens only for a reasonable time beyond the ninety day removal period. While we could reach this construction of the statute simply by invoking the doctrine of constitutional avoidance, it is not necessary to rest our decision on that legal principle. As the above discussion makes clear, ordinary tenets of statutory construction lead us to that same result. What constitutes a reasonable time will depend on the circumstances of the various cases. Here, we need not address all the conceivable situations that could arise to delay or preclude removal. We need hold only that where it is reasonably likely that an alien who has entered the United States cannot be removed in the reasonably foreseeable future, detention beyond the removal period is not justified. [FN29]

In Ma's case, the district court did not err in concluding that there is not a reasonable likelihood that the INS will be able to remove Ma to Cambodia. Although the INS offered evidence that the State Department has submitted a proposal for a repatriation agreement to the Cambodian government, both sides agree that the United States has no functioning repatriation agreement with that country, that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time). In the absence of a repatriation agreement, extant or pending, we must affirm the district court's finding that there is no reasonable likelihood that the INS will be able to accomplish Ma's removal. [FN30] Under these circumstances, the INS may not detain Ma any longer.

We stress that our decision does not leave the government without remedies with respect to aliens who may not be detained permanently while awaiting a removal that may never take place. All aliens ordered released must comply with the stringent supervision requirements set out in 8 U.S.C. § 1231(a)(3). Ma will have to appear before an immigration officer periodically, answer certain questions, submit to medical or psychiatric testing as necessary, and accept reasonable restrictions on his conduct and activities, including severe travel limitations. More important, if Ma engages in any criminal activity during this time, including violation of his supervisory release conditions, he can be detained and incarcerated as part of the normal criminal process. [FN31]

*12 For the foregoing reasons, the district court's decision is

AFFIRMED.

FN1. There are also many aliens from Laos and Vietnam who cannot be removed because our government has no repatriation agreement with those countries.

FN2. In the district court in which Ma sought relief, over one hundred habeas corpus petitioners challenged their ongoing detention by the INS in cases similar to his. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. A single judge then applied this ruling to Ma and held that he should be released. Similar cases involving a large number of habeas petitioners have arisen in Nevada, and the Central, Eastern, and Southern Districts of California.

FN3. Although neither party has argued either that the district court lacked jurisdiction over Ma's constitutional claims or that this court lacks jurisdiction to hear this appeal, the INS argued at one point in its brief that the general federal habeas statute, 28 U.S.C. § 2241, does not provide jurisdiction to hear any claim of statutory error or abuse of discretion. However, our recent decision in Magana-Pizano v. INS, 200 F.3d 603 (9th Cir.1999), makes clear that the scope of review under the general federal habeas statute, 28 U.S.C. § 2241, has not been limited by 8 U.S.C. § 1252, because that section does not mention habeas corpus explicitly. Id. at 609 (citing Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). Claims of statutory error and abuse of discretion in the application of the immigration laws have long been cognizable on habeas corpus. See Magana-Pizano, 200 F.3d at 609 (holding that general habeas statute allows review of statutory questions); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (reviewing denial of discretionary relief (suspension of deportation) on the merits, and reversing on ground that discretion was not exercised consistent with the statute). Thus, we hold

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that 8 U.S.C. § 1252 does not preclude us from considering Ma's non- constitutional arguments on habeas corpus.

FN4. The Cambodian government denied the request, as it does all such requests, because of the absence of a repatriation agreement.

FN5. Internal INS regulations (known as the "Pearson I" regulations) required that Ma's case be reviewed before the end of the ninety day period. However, Ma received his custody review approximately 100 days after that period had run (190 days after his removal order became final).

FN6. 8 C.F.R. § 241.4.

FN7. The letter also stated that Ma's case would be reviewed again six months from the date of the letter, on December 2, 1999. It also stated that Ma had the right to submit a request for redetermination of his custody status at any time.

FN8. After Ma and the other four lead petitioners prevailed in district court, the INS implemented additional regulations, known as the "Pearson II" regulations, which provided for additional review of custody decisions. These regulations provide for review of the decisions of district directors by INS Headquarters, which was then done in this case.

FN9. The INS sought to stay the district court's release order. The district court denied the order but granted the INS a temporary stay so that it might attempt to secure an emergency stay from this court. We denied the stay. The INS filed a second emergency stay request, pending appeal to the Supreme Court. We again denied the stay and ordered Ma released. He was released that evening. The INS then sought a stay from the Supreme Court. Justice O'Connor ordered a temporary stay pending a review by the whole Court. Ma surrendered to INS custody pending the Court's decision. The Court denied the INS's stay request, and Ma was again ordered released.

FN10. See 8 U.S.C. § 1231(a)(1)(A)-(B). If the removal order is stayed pending judicial review, the ninety day period begins running after the reviewing court's final order. 8 U.S.C. § 1231(a)(1)(B)(ii).

FN11. See, e.g., Caranica v. Nagle, 28 F.2d 955 (9th Cir.1928) (involving deportation order to Greece of alien born in Macedonia, which was then a Turkish province that was later partitioned among several countries, including Greece, where Greece would not recognize alien as a citizen).

FN12. The sub-section provides in full that [a]n alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). 48 U.S.C. § 1231(a)(6).

FN13. Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to substantial deference, INS v. Aguirre-Aguirre, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999), we have held that Chevron principles (Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)) are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe. Williams v. Babbitt, 115 F.3d 657, 661-63 (9th Cir.1997) (analyzing DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) and Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), noting the agency's lack of constitutional expertise, and concluding that "just as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so"). As we explain infra, the agency's interpretation raises just such a substantial question.

FN14. Petitioner also contests the procedures used by INS when considering his requests for release, asserting that they violate procedural due process. Given our holding, we need not reach that constitutional question either.

FN15. The Court has also described the canon as applying to "difficult," "serious," or "grave" constitutional issues. See, e.g., United States v. Winstar Corp., 518 U.S. 839, 875, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); Allentown Mack Sales v. NLRB, 522 U.S. 359, 387, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (Rehnquist, CJ, concurring in part and dissenting in part); Jones v. United States, 526 U.S. 227, 239, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Regardless of the terminology used, the point seems to be the same: a party cannot force us to ignore the usual canons of statutory construction by raising a frivolous, insubstantial, or patently

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incorrect constitutional argument. Nor, as the Court put it in United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985), may we resort to "disingenuous evasion" in our interpretation of the statute to avoid a constitutional question.

FN16. The INS also makes repeated reference to Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). However, Carlson upheld the constitutionality of detention pending the INS's decision whether to deport an alien, and expressly noted that the problem of "unusual delay" was not before it, and referenced a case involving a Russian petitioner who alleged that his country would not accept his return. Id. at 546 (citing United States ex rel. Potash v. District Director, 169 F.2d 747, 748 (2d Cir.1948)).

FN17. Although the INS notes that the plaintiff in Mezei was previously a lawful resident of the U.S. for twenty-five years, the Court made clear that he was to be treated as an excludable alien because of his long departure from the U.S., and could not have his status "assimilated" to that of a permanent resident. In doing so, the Court distinguished, on its facts, its then-recent decision in Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), which authorized such assimilation of status under some circumstances. Mezei, 345 U.S. at 213-14. There is no doubt that Mezei was considered by the Court to be an excludable alien who had not entered the U.S., despite what the Court referred to as his "prior residence here." See Mezei at 212-13.

FN18. Barrera-Echavarria was paroled while excluded, committed numerous crimes, and thereafter was taken back into custody. Barrera-Echavarria, 44 F.3d at 1444. His parole did not constitute an entry. Leng May Ma v. Barber, 357 U.S. 185, 188, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958).

FN19. Amici Law Professors note in their brief that in its petition for rehearing en banc which led to the Barrera-Echavarria decision the INS relied on the fact that the petitioner was an alien seeking admission (rather than one who had entered).

FN20. In Barrera-Echavarria, we concluded that the statutes there at issue, which applied only to the detention of excludable aliens, allowed for the long-term detention of such aliens, id. at 1445, and went on to hold that such detention is constitutional. There is no inconsistency between our statutory holding in Barrera-Echavarria and our statutory holding here. We found the statutory authority to hold Barrera-Echavarria for a prolonged period implicit in the history and structure of several provisions granting broad discretion to the Attorney General to parole excludable aliens into the country under certain circumstances. Id. at 1445-48. We noted that the parole of excludable aliens had always been the exception rather than the rule, and that releasing such aliens into the country pending deportation would run contrary to the basic statutory scheme precluding such entry. Id. at 1447. In the case before us, we consider the entirely different question of aliens who have already entered the country. Thus, unlike in Barrera-Echavarria, there is no long- standing statutory scheme that would be "upset" by barring prolonged detention here. Id. at 1446. Most important, because in Barrera-Echavarria the various statutory provisions at issue did not apply to the detention of aliens who had already entered the United States, there was no need to invoke the canon of constitutional avoidance. The constitutional result in Barrera-Echavarria was dictated by the Supreme Court's holding in Mezei regarding excludable aliens.

FN21. The cases extending Fifth Amendment protection to aliens are fully consistent with our general jurisprudence granting significant constitutional protections to aliens within the territory of the United States. The Supreme Court has held that the Equal Protection Clause applies to aliens, Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), that the Fourth Amendment applies to aliens (within U.S. territory), Almeida-Sanchez v. United States, 413 U.S. 266, 274, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), and that the First Amendment applies to aliens. Bridges v. Wixon, 326 U.S. 145, 148 (1945) (holding that "freedom of speech and of press is accorded aliens residing in this country"); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) (same).

FN22. The INS cites Fong Yue Ting v. United States, 149 U.S. 698, 711- 13, 13 S.Ct. 1016, 37 L.Ed. 905 (1893), for the proposition that "[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." Id. at 713. However, that proposition as applied to the distinction between the constitutional rights of deportable and excludable aliens is no longer good law. The Court in Fong Yue Ting went on to hold that aliens may be deported using processes exercised "entirely through executive officers." Id. at 714. That part of Fong Yue Ting 's holding was overruled ten years later, when the Supreme Court

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held that deportation proceedings for aliens within the U.S. must conform to due process. Yamataya v. Fisher, 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed. 721 (1903).

FN23. We note that the Fifth Circuit relied on the INS's argument in resolving the constitutional question we avoid today, holding that long- term detention of removable aliens who have been ordered deported does not violate substantive due process. Zadvydas v. Underdown, 185 F.3d 279 (5th Cir.1999). Although we seriously question the Fifth Circuit's conclusion in that case, and in particular its reading of Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), and Landon v. Plasencia, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), we need not reach the constitutional question here. At the very least, it is clear from reading Zadvydas that a substantial constitutional question exists regarding the construction of § 1231(a)(6).
Following oral argument, the Tenth Circuit considered the constitutional question in Ho v. Greene, 204 F.3d 1045, 2000 WL 228755 (10th Cir. Feb.29, 2000), and, by a 2-1 vote, accepted the Fifth Circuit's view. Moreover, the Tenth Circuit concluded that because § 1231(a)(6) was silent as to any time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens." Id. at *9. For the reasons stated below, we do not find the Tenth Circuit's reasoning persuasive.

FN24. The INS also argues that all immigration-related decisions are entitled to substantial deference under the plenary power, citing Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). However, it is not clear what role the plenary power played in Flores. In that case, the Court found that rational basis review applied, noted that the plenary power was applicable, but then stated that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." Flores, 507 U.S. at 306. Ma argues that the plenary power's general deference rule does not apply in every case, citing INS v. Chadha, 462 U.S. 919, 940-41, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing [the plenary] power.... Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." (internal citation omitted)) and Hampton v. Mow Sun Wong, 426 U.S. 88, 99-101, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (striking down Civil Service Commission's blanket ban on employing non-citizens and rejecting contention that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). It is not clear why the plenary power's deference rule should apply here given that such deference was not afforded in Chadha or in Hampton. In any event, the Supreme Court's cases make clear that the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraints.

FN25. In the prior statute, Congress used language prohibiting release (subject to some exceptions) rather than the language authorizing detention used here. See 8 U.S.C. § 1252(a)(2)(B) (1995) (stating that the "Attorney General may not release [deportable aliens convicted of an aggravated felony] ... either before or after a determination of deportability [subject to some exceptions].") (emphasis added). The two custody provisions that succeeded the 1995 version of this law (and preceded the current version) did not change this language in any way relevant to our analysis. The same "may not release ... either before or after" language was in both statutes. See AEDPA § 440(c); IIRIRA § 303(b)(3) (the transitional custody rule). The prohibitory language used there is obviously far stronger than the permissive language used in the new law. More important, however, Congress is familiar with time limitations in the detention and removal context, and could easily have authorized detention "without limitation" or "indefinitely" if it so desired. See, e.g., 8 U.S.C. § 1231(a)(1)(A); 1231(a)(1)(C); 1231(b)(2)(C); 1231(b)(2)(D); 1231(c)(3)(A); 1231(c)(3)(B) (all specifying various time periods in detention and removal context).

FN26. See An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 19, 39 Stat. 874, 889 (1917).

FN27. Notably, the "reasonable time" allowed to effectuate deportation in such cases seems to have been quite short by contemporary standards. In Caranica the court held that a two month deadline was not an abuse of discretion, 28 F.2d at 957, while in Wolck the court gave the government thirty days to implement the order, 58 F.2d at 931; in Wallis the Second Circuit required release after four months. 279 F. at 404.

FN28. This court has held that within the domestic legal structure, international law is displaced by "a

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properly enacted statute, provided it be constitutional, even if that statute violates international law." Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir.1991) (involving prolonged detention of excludable aliens); see also Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir.1995). Those rulings, however, do not suggest that courts should refrain from applying the Charming Betsy principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. See Restatement (Third) of International Law § 115(1)(a) ("An Act of Congress supercedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supercede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

FN29. We recognize that our reference to aliens who have already entered is, in one sense, too broad. Aliens who entered the United States in the past but have since left for a significant time have no more constitutional rights than first-time would-be entrants. See Landon, 459 U.S. at 30; Mezei, 345 U.S. at 213. They are considered "excludable."

FN30. We note that our construction of the statute does not require us to "second-guess" or otherwise interfere with the foreign policy actions of the United States government. On the contrary, we have taken at face value the evidence submitted by a State Department officer regarding the status of the government's attempts to establish a repatriation agreement with Cambodia. He has candidly stated that he cannot predict when a repatriation agreement will be established and begin to function.

FN31. We note that the regulations governing Ma's release state that he can be detained for violating them, and moreover that violations of supervisory release conditions are punishable by fine and/or imprisonment under 8 U.S.C. § 1253(b).

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Duy Dac HO, Petitioner-Appellee,
v.
Joseph GREENE, District Director, Immigration and Naturalization Service, Respondent-Appellant.
Loi Tan Nguyen, Petitioner-Appellee,
v.
Joseph Greene, District Director, Immigration and Naturalization Service, Respondent-Appellant.
American Immigration Lawyers Association, National Immigration Project of the National Lawyer's Guild, Justice Information Center, Inc., Human Rights Watch, Human Rights Advocates, World Organization Against Torture USA, Jesuit Refugee Service, International Human Rights Law Group, and the Extradition and Human Rights Committee of the American Branch of the International Law Association, University of Colorado Legal Aid & Defender Program, Amici Curiae.

Nos. 98-1333, 99-1256, 99-1182.

United States Court of Appeals,
Tenth Circuit.

Feb. 29, 2000.

Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin filed separate habeas petitions challenging their indefinite detention pending execution of final removal orders. The United States District Court for the District of Colorado, Wiley Y. Daniel, granted petitions. Immigration and Naturalization Service (INS) appealed, and appeals were consolidated. The Court of Appeals, Murphy, Circuit Judge, held that: (1) District Court had jurisdiction to consider aliens' habeas claims to extent transitional provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) or pre-IIRIRA provisions of Immigration and Nationality Act (INA) applied to them, (2) as matter of first impression, District Court had jurisdiction to consider aliens' habeas claims to extent permanent provisions of IIRIRA applied to them; (3) Attorney General is required indefinitely to detain, after entry of final order of exclusion, excludable alien who has been convicted of aggravated felony, absent determination that alien does not pose danger to safety of other persons or to property; (4) IIRIRA confers statutory authority on Attorney General to indefinitely detain alien who cannot be removed during removal period if alien has been found to be risk to community or unlikely to comply with removal order; and (5) aliens did not have liberty interest in being released from custody.

Reversed and remanded.

Brorby, Circuit Judge, dissented and filed opinion.

[1] HABEAS CORPUS ⇐521
197k521
District court had jurisdiction over aliens' habeas petitions challenging their detention pending execution of final removal orders, to extent transitional provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) or pre-IIRIRA provisions of Immigration and Nationality Act (INA) applied to them. 28 U.S.C.A. § 2241.

[2] HABEAS CORPUS ⇐521
197k521
To extent permanent provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) applied to aliens being detained pending execution of final removal orders, district court was not deprived of jurisdiction over their habeas petitions challenging such detention by IIRIRA section barring judicial review of Attorney General's discretionary decisions to commence proceedings, adjudicate cases, or execute removal orders, inasmuch as aliens did not ask for review of such decisions. Immigration and Nationality Act, § 242(g), as amended, 8 U.S.C.A. § 1252(g); 28 U.S.C.A. § 2241.

[3] HABEAS CORPUS ⇐521
197k521
To extent permanent provisions of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) applied to aliens being detained pending execution of final removal orders, district court was not deprived of jurisdiction over their habeas petitions challenging such detention by IIRIRA section precluding court jurisdiction over certain decisions of Attorney General specified by IIRIRA as being discretionary. Immigration and Nationality Act, § 242(a)(2)(B)(ii), as amended, 8 U.S.C.A. § 1252(a)(2)(B)(ii); 28 U.S.C.A. § 2241.

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[4] FEDERAL COURTS ⇐776
170Bk776
The interpretation of a federal statute is a question of law reviewed de novo.

[5] ADMINISTRATIVE LAW AND PROCEDURE ⇐683
15Ak683
A district court's resolution of claims alleging constitutional violations by an agency is reviewed de novo.

[6] ALIENS ⇐53.9
24k53.9
The section of the Immigration and Nationality Act (INA) of 1990 authorizing the Attorney General to take into custody an alien who has been convicted of an aggravated felony pending a determination of the alien's excludability authorizes the Attorney General to continue to detain an excludable alien who has been convicted of an aggravated felony after the entry of a final order of exclusion. Immigration and Nationality Act, § 236(e), as amended, 8 U.S.C.A. § 1226(e).

[7] ALIENS ⇐53.9
24k53.9
Under the Immigration and Nationality Act (INA) of 1990, the Attorney General must continue indefinitely to detain, after entry of a final order of exclusion, an excludable alien who has been convicted of an aggravated felony unless a review of the alien's request for relief concludes that the alien does not pose a danger to the safety of other persons or to property. Immigration and Nationality Act, § 236(e), as amended, 8 U.S.C.A. § 1226(e).

[8] ALIENS ⇐53.9
24k53.9
The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) confers on the Attorney General the statutory authority to indefinitely detain an alien who cannot be removed during his or her removal period if that alien has been found to be a risk to the community or unlikely to comply with the removal order. Immigration and Nationality Act, § 241(a)(6), as amended, 8 U.S.C.A. § 1231(a)(6).

[9] CONSTITUTIONAL LAW ⇐70.1(11)
92k70.1(11)
The Court of Appeals will not substitute its judgment for that of Congress by reading into a statute a time limit that is not included in the plain language of the statute.

[10] ALIENS ⇐53.9
24k53.9
Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin did not have liberty interest protected by due process clause in being released from custody of Attorney General, notwithstanding their presence in United States and fact that one of them was formerly a lawful permanent resident. U.S.C.A. Const.Amend. 5.

[10] CONSTITUTIONAL LAW ⇐274.3
92k274.3
Aliens who had been ordered removed from United States but whose return had not been accepted by their country of origin did not have liberty interest protected by due process clause in being released from custody of Attorney General, notwithstanding their presence in United States and fact that one of them was formerly a lawful permanent resident. U.S.C.A. Const.Amend. 5.

[11] CONSTITUTIONAL LAW ⇐251.2
92k251.2
The due process protection of the Fifth Amendment has two components, a substantive due process component and a procedural due process component. U.S.C.A. Const.Amend. 5.

[11] CONSTITUTIONAL LAW ⇐251.5
92k251.5
The due process protection of the Fifth Amendment has two components, a substantive due process component and a procedural due process component. U.S.C.A. Const.Amend. 5.

[12] CONSTITUTIONAL LAW ⇐251.2
92k251.2
The substantive component of the Fifth Amendment's due process clause precludes the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. U.S.C.A. Const.Amend. 5.

[13] CONSTITUTIONAL LAW ⇐255(1)
92k255(1)
The procedural component of the Fifth Amendment's due process clause precludes the

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government from depriving a person of life, liberty, or property in an unfair manner. U.S.C.A. Const.Amend. 5.

[13] CONSTITUTIONAL LAW ⇐278(1)
92k278(1)
The procedural component of the Fifth Amendment's due process clause precludes the government from depriving a person of life, liberty, or property in an unfair manner. U.S.C.A. Const.Amend. 5.

[14] CONSTITUTIONAL LAW ⇐254.1
92k254.1
Substantive and procedural due process claims must be supported by an underlying liberty interest. U.S.C.A. Const.Amend. 5.

[15] CONSTITUTIONAL LAW ⇐254.1
92k254.1
A liberty interest protected by the due process clause can arise in one of two ways: (1) from the due process clause itself, or (2) from a state or federal statute. U.S.C.A. Const.Amend. 5.

[16] CONSTITUTIONAL LAW ⇐252.5
92k252.5
Any due process analysis must begin with a careful description of the asserted right. U.S.C.A. Const.Amend. 5.

[17] CONSTITUTIONAL LAW ⇐252
92k252
Aliens who are physically present in the United States but who are not lawful permanent residents are entitled to some of the protections afforded by the Fifth Amendment. U.S.C.A. Const.Amend. 5.

[18] ALIENS ⇐4
24k4
Physical presence in the United States alone does not confer heightened constitutional rights on an alien seeking admission to the United States.

[19] ALIENS ⇐4
24k4
While aliens physically present in the United States are "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission to the United States. U.S.C.A. Const.Amend. 5.

[19] CONSTITUTIONAL LAW ⇐252
92k252
While aliens physically present in the United States are "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission to the United States. U.S.C.A. Const.Amend. 5.

[20] ALIENS ⇐53
24k53
Notwithstanding their physical presence in the United States, aliens subject to final removal orders have no greater constitutional rights with respect to their applications for admission than an alien seeking to enter the United States for the first time.

[21] ALIENS ⇐53.6(2)
24k53.6(2)
Once a removal order has become final and an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his or her application for admission as an excludable alien.

***1048** Emily Anne Radford, Senior Litigation Counsel, Office of Immigration Litigation, (Allen W. Hausman, Senior Litigation Counsel; David M. McConnell, Assistant Director; and H. Bradford Glassman, Trial Attorney, Office of Immigration Litigation, with her on the briefs), Department of Justice, Washington, D.C., for Respondent-Appellant.

Judy Rabinovitz, ACLU Immigrants' Rights Project, New York, New York, (Jim Salvator, Lafayette, Colorado; Wanyong Austin, ACLU Immigrants' Rights Project, New York, New York; Mark Silverstein, ACLU Foundation of Colorado, Denver, Colorado; Kathryn Palamountain, ACLU Immigrants' Rights Project, San Francisco, California, with her on the briefs), for Petitioners-Appellees.

Ken Stern, Stern & Elkind, Denver, Colorado; Christine C. Bartlett, Justice Information Center, Denver, Colorado; and Norman Aaronson, Legal Aid & Defender Program, University of Colorado, Boulder, Colorado, filed an Amici Curiae Brief for American Immigration Lawyers Association, National Lawyer's Guild, Justice Information Center, and University of Colorado Legal Aid & Defender Program.

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Sheldon Friedman, Isaacson, Rosenbaum, Woods & Levy, P.C., Denver, Colorado; Paul L. Hoffman, Bostwick & Hoffman, LLP, Santa Monica, California; and William J. Aceves, California Western School of Law, San Diego, California, filed an Amici Curiae Brief for Human Rights Watch, Human Rights Advocates, World Organization Against Torture USA, Jesuit Refugee Service, International Human Rights Law Group, and The Extradition and Human Rights Committee of the American Branch of the International Law Association.

Before BRORBY, BRISCOE, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Petitioners-Appellees, Duy Dac Ho ("Ho") and Loi Tan Nguyen ("Nguyen") (collectively "Petitioners") were each convicted of aggravated felonies and ordered removed from the United States. Upon release from state prison, each Petitioner was taken into custody by the Immigration and Naturalization Service ("INS"). Because their country of origin, Vietnam, would not accept their return, Petitioners were detained in an INS detention facility. Petitioners each filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In their habeas petitions, Petitioners did not contest their deportability. Rather, both argued that the Attorney *1049 General [FN1] lacks statutory authority to detain them indefinitely pending execution of the final removal order and that their continued detention violates the Constitution of the United States. The district court granted both petitions [FN2] and ordered Petitioners released from INS custody on bond. The INS appealed and the cases were consolidated. This appeal presents the question of whether the Attorney General has the statutory authority to indefinitely detain a removable alien. Because this court determines such detention to be statutorily authorized, we also address whether such detention violates any substantive or procedural due process rights afforded removable aliens by the Fifth Amendment. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse.

FN1. The Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens. See 8 U.S.C. § 1103(a)(1). Pursuant to the authority conferred on her by 8 U.S.C. § 1103(a), the Attorney General has delegated her authority to enforce all laws relating to the immigration and naturalization of aliens to the Commissioner of the INS who, in turn, may redelegate any such authority to any other officer or employee of the INS. See 8 C.F.R. § 2.1.

FN2. Although the district court granted both habeas petitions to the extent Petitioners sought release on bail, the court denied the requests for attorneys' fees and costs made in the petitions. The district court's denial of attorneys' fees and costs has not been appealed by either Ho or Nguyen.

I. FACTUAL BACKGROUND

A. No. 98-1333

Petitioner-Appellee Ho is a citizen and national of Vietnam. Ho lawfully entered the United States as a refugee in 1985. Ho has never applied for and, consequently, never obtained lawful permanent resident status. In 1988, Ho was sentenced to thirty-three months' imprisonment for aggravated robbery, assault, and burglary. In 1992, he was sentenced to an additional seventy-eight months' imprisonment for a second aggravated robbery committed in 1991. On June 24, 1996, following an exclusion hearing, Ho was ordered excluded from the United States. Ho did not appeal the order of exclusion. Ho was released from the custody of the Minnesota Department of Corrections to the INS for deportation and has been in INS custody since June 1996. The INS formally requested travel documents for Ho from the Vietnamese government on July 11, 1996. The Vietnamese government has not issued the requested travel documents. On January 22, 1998, the INS denied Ho's request for immigration parole, stating there were no "urgent humanitarian reasons" justifying parole and that Ho had failed to demonstrate that he would not be a public danger, or that he would not flee.

On April 16, 1998, Ho filed a petition with the United States District Court for the District of Colorado seeking a writ of habeas corpus. In his petition, Ho alleged that his continued detention by the INS was not authorized by statute and violated his constitutional due process rights. The district court, relying on this court's opinion in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir.1981), granted the writ and ordered Ho released on bond. The INS appealed.

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B. No. 99-1182

Petitioner-Appellee Nguyen is a native and citizen of Vietnam. Nguyen entered the United States as a refugee in 1981 and obtained lawful permanent resident status in 1984. On January 5, 1993, Nguyen was convicted of aggravated robbery and vehicular eluding and sentenced to a thirteen-year term of imprisonment. The INS initiated deportation proceedings against Nguyen on January 10, 1994, and he was ordered deported on January 8, 1996. Nguyen appealed this decision but his appeal was dismissed on January 10, 1997 and his motion for reconsideration was denied on July 7, 1997. Nguyen was released from incarceration by the state of Colorado and paroled into the custody of *1050 the INS for deportation on August 12, 1997. The INS formally requested travel documents for Nguyen from the Vietnamese government on October 2, 1997. The Vietnamese government has not issued the requested travel documents.

On at least two occasions, Nguyen has requested to be released from INS custody. The INS has denied each of Nguyen's requests for release. In December, 1998, the INS's Acting District Director for the Denver District denied Nguyen's most recent request for release, concluding that Nguyen failed to show, by clear and convincing evidence, that he does not pose a safety or flight risk if released.

On June 22, 1998, Nguyen filed a petition with the United States District Court for the District of Colorado seeking a writ of habeas corpus and alleging that his continued detention was not authorized by statute and violated his Fifth Amendment substantive and procedural due process rights. The district court, relying on this court's opinion in Rodriguez-Fernandez, granted the writ and ordered Nguyen released on bond. See id. The INS brought this appeal.

II. DISCUSSION

A. Jurisdiction

Although neither Petitioners nor the INS challenge the jurisdiction of either the district court or this court, this court must address this predicate question before proceeding to the merits of these appeals. See Arizonans for Official English v. Arizona, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA). As a result of the enactment of IIRIRA, no fewer than three versions of the INA may govern the jurisdictional question before this court. Generally, the permanent provisions of IIRIRA apply only to removal proceedings commenced after April 1, 1997, IIRIRA's effective date. See IIRIRA § 309(a), Pub.L. No. 104-208, 110 Stat. 3009, 3009-625. Exclusion proceedings against Ho were commenced prior to IIRIRA's April 1, 1997 general effective date. Deportation proceedings against Nguyen were also commenced prior to April 1, 1997. Arguably, therefore, the permanent provisions of IIRIRA do not govern judicial review of the § 2241 habeas petitions filed by Ho and Nguyen. At least one Circuit Court of Appeals, however, has concluded that the effective-date provisions of IIRIRA are ambiguous and has held that the permanent provisions of IIRIRA govern judicial review of habeas corpus petitions filed by aliens against whom removal proceedings had commenced prior to April 1, 1997 but who had also received final removal orders before that date. See Zadvydas v. Underdown, 185 F.3d 279, 287 & 286 n. 7 (5th Cir.1999). Because both Ho and Nguyen received final removal orders before April 1, 1997, [FN3] the permanent provisions of IIRIRA thus may apply.

FN3. Ho did not appeal the final order of exclusion which was entered against him on June 24, 1996. Nguyen's appeal of his final order was dismissed on January 10, 1997. His motion for reconsideration was denied on July 7, 1997 as untimely.

IIRIRA also contains transitional rules applicable to removal proceedings commenced before April 1, 1997, in which deportation orders became administratively final after October 30, 1996. See IIRIRA § 309(c)(4), Pub.L. No. 104-208, 110 Stat. 3009, 3009-626. Because Ho's removal order became final before October 30, 1996, the transitional rules do not apply to his petition. Removal proceedings against Nguyen, however, commenced prior to April 1, 1997, and his deportation order became final after October 30, 1996. The transitional rules, thus, may govern

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judicial review of Nguyen's habeas petition. We need not and do not decide which *1051 version of the INA applies because neither the permanent, transitional, nor pre-IIRIRA provisions of the INA bar judicial review of the claims brought by Ho and Nguyen in their § 2241 habeas petitions.

[1] Before IIRIRA, district courts had jurisdiction over § 2241 habeas petitions like those brought by Petitioners. See Galaviz-Medina v. Wooten, 27 F.3d 487, 491-92 (10th Cir.1994) (holding that district courts have jurisdiction over habeas petitions in which a petitioner in INS detention raises constitutional due process claims). Additionally, assuming, without deciding, that IIRIRA's transitional rules apply to Nguyen, the district court had jurisdiction over Nguyen's § 2241 habeas petition. See Jurado- Gutierrez v. Greene, 190 F.3d 1135, 1146 (10th Cir.1999) (holding that IIRIRA's transitional rules do not eliminate or alter traditional habeas review available under § 2241). Therefore, to the extent either the pre-IIRIRA provisions of the INA or the transitional provisions of IIRIRA apply, the district court had jurisdiction over the § 2241 habeas petitions filed by Ho and Nguyen.

[2] This court has never addressed the question of whether the permanent provisions of IIRIRA divest the federal courts of jurisdiction over § 2241 habeas petitions. Two permanent provisions may impact the cases at bar. INA § 242(g), as amended by IIRIRA § 306(a)(2) and codified at 8 U.S.C. § 1252(g), bars judicial review of the Attorney General's discretionary decisions to "commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). Section 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings...." IIRIRA § 306(c)(1), Pub.L. No. 104- 208, 110 Stat. 3009, 3009-612. Therefore, notwithstanding the general, effective-date provision of IIRIRA, § 1252(g) applies to both Ho and Nguyen. The Supreme Court, however, has recently interpreted § 1252(g) to preclude judicial review of only the three discrete, discretionary acts specifically delineated in the statute. See Reno v. American-Arab Anti- Discrimination Comm., 525 U.S. 471, 119 S.Ct. 936, 943-45, 142 L.Ed.2d 940 (1999). Neither Ho nor Nguyen has asked this court to review the Attorney General's decision to commence proceedings against him, her decision to adjudicate his case, or her decision to execute the removal order. Thus, § 1252(g) does not preclude judicial review of either Petitioner's habeas petition. See Jurado-Gutierrez, 190 F.3d at 1144-45 (holding that § 1252(g) does not bar judicial review of § 2241 habeas petitions that challenge final removal orders); Parra v. Perryman, 172 F.3d 954, 957 (7th Cir.1999) (holding that the decision to continue to detain a removable alien does not implicate § 1252(g)).

[3] If applicable, 8 U.S.C. § 1252(a)(2)(B)(ii), a permanent provision added to the INA by IIRIRA § 306(a)(2), also significantly limits judicial review of immigration matters. Section 1252(a)(2)(B)(ii) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review ... (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

Even if this permanent provision applies to Ho and/or Nguyen, a question this court does not decide, § 1252(a)(2)(B)(ii) does not bar judicial review of the issues before this court. Neither Ho nor Nguyen challenges one of the discretionary decisions made by the Attorney General for which judicial review is barred by § 1252(a)(2)(B)(ii). Cf. Van Dinh v. Reno, 197 F.3d 427, 434 (10th Cir.1999) (concluding that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the Attorney General's discretionary decision to transfer an alien from one correctional facility to another). Both Petitioners, instead, challenge the *1052 statutory and constitutional authority for their continued detention. Section 1252(a)(2)(B)(ii) bars judicial review of discretionary decisions. It does not bar judicial review of § 2241 habeas petitions, like those before this court, which challenge the validity and constitutionality of the statutes authorizing the continued detention of removable aliens. Cf. Parra, 172 F.3d at 957 (concluding that 8 U.S.C. § 1226(e) bars judicial review of "challenges to operational decisions, rather than to the legislation establishing the framework for those decisions."). [FN4] Petitioners' claims clearly fall outside the jurisdictional bars of § 1252(a)(2)(B)(ii) and § 1252(g) but squarely within 8 U.S.C. § 2241. Therefore, this court has jurisdiction.

FN4. In Parra v. Perryman, the Seventh Circuit Court of Appeals confronted the INS's argument that 8 U.S.C. § 1226(e), a statute similar to 8 U.S.C. § 1252(a)(2)(B)(ii), bars judicial review of § 2241 habeas petitions. See 172 F.3d 954, 957 (7th Cir.1999). Section 1226(e) states, "No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The Seventh Circuit concluded that § 1226(e) did not divest the federal courts of jurisdiction over habeas petitions which included constitutional claims challenging the alien's continued detention. See Parra, 172 F.3d at 957. Arguably, however, § 1226(e) applies only to discretionary decisions made by the Attorney General pending the entry of a final removal order. See 8 U.S.C. § 1226(a) (1999) ("[A]n alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." (emphasis added)).

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B. Standard of Review

In their habeas petitions, both Ho and Nguyen argued the Attorney General does not have statutory authority to detain them indefinitely pending execution of the final order of removal. The district court did not directly address Petitioners' statutory argument, holding instead that their prolonged detention constituted unconstitutional incarceration. Neither district court Order identifies the statute governing the continued detention of Petitioners and, consequently, neither Order addresses the statutory argument raised in the two habeas petitions. Because the constitutional questions raised by Petitioners and directly addressed by the district court could only be reached if the district court first found that there is statutory authority for the continued detention of both Ho and Nguyen, this court will construe each district court ruling as including a determination that the governing statutes authorize the Attorney General to indefinitely detain Petitioners.

[4][5] The interpretation of a federal statute is a question of law which this court reviews de novo. See Utah v. Babbitt, 53 F.3d 1145, 1148 (10th Cir.1995). This court also conducts a de novo review of a district court's resolution of claims alleging constitutional violations by an agency. See Burke v. Board of Governors of the Federal Reserve System, 940 F.2d 1360, 1367 (10th Cir.1991).

C. Statutory Authority to Detain Indefinitely

1. No. 98-1333

As a prefatory matter, there is disagreement between the parties as to which statute governs the continued detention of Ho. The INS argues that the Attorney General's authority to continue to detain Ho arises under former 8 U.S.C. § 1226(e) (1994). Ho argues that the plain language of former § 1226 limits its application to the detention of aliens who are awaiting a final determination of excludability. Ho has received such a determination. Ho claims the only statute that authorizes the continued detention of an excludable alien after entry of a final order of exclusion is former 8 U.S.C. § 1227 (1994), [FN5] a statute *1053 nearly identical to the one interpreted by this court in Rodriguez-Fernandez and held to authorize detention only for a reasonable time in which to effectuate the deportation. See 654 F.2d at 1389.

FN5. During oral argument, Ho's counsel suggested that Ho's continued detention, like Nguyen's, is governed by the current version of 8 U.S.C. § 1231(a)(6). Assuming, without deciding, that 8 U.S.C. § 1231(a)(6) applies to Ho's continued detention, that statute, for the reasons discussed infra, expressly authorizes the Attorney General to indefinitely detain removable aliens, like Ho, who have been convicted of aggravated felonies.

In Rodriguez-Fernandez, this court addressed the question of whether the statutes in effect in 1981 authorized the Attorney General to indefinitely detain an excludable alien who could not be expeditiously deported. See 654 F.2d at 1384-85. Immigration officials allowed the alien, Rodriguez-Fernandez, to depart from the boat on which he had arrived in the United States and placed him into custody pending a determination of his eligibility to enter this country. See id. at 1384. After determining that Rodriguez-Fernandez was not clearly entitled to land, immigration officials continued to detain him pending an exclusion hearing. See id. Rodriguez-Fernandez was eventually ordered deported, but Cuba, his country of origin, refused to accept him. See id. Rodriguez-Fernandez, therefore, remained in INS detention. See id.

The Rodriguez-Fernandez majority reviewed the statutes which ostensibly authorized the Attorney General to detain an excludable alien both (1) prior

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to the determination of excludability and (2) after a final order of exclusion had been entered. See id. at 1389. The majority summarized the statutes governing detention pending a final order of exclusion as follows:

> Provisions relating to excludable aliens seeking entry ... provide for "temporary removal" from the transportation vehicle or vessel to a place of "detention, pending a decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the transportation line or to the vessel or aircraft which brought them."

Id. (quoting 8 U.S.C. § 1223(b)).

The majority's analysis of the statutes governing the Attorney General's duties and authority following entry of a final order of exclusion included an analysis of former 8 U.S.C. § 1227. See id. at 1389-90. Former § 1227 instructed the Attorney General to immediately effectuate the excludable alien's deportation, "unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." 8 U.S.C. § 1227(a)(1) (1961).

In an effort to avoid what it believed were problematic constitutional questions, the Rodriguez-Fernandez majority refused to construe former § 1227 to permit the Attorney General to indefinitely detain an excludable alien whose deportation could not be expeditiously accomplished. See 654 F.2d at 1389-90. The majority concluded that the applicable statutes, including former 8 U.S.C. § 1227, authorized the Attorney General to detain excludable aliens only "during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return to the country of origin or to the transporter that brought them here." Id. at 1389.

After Rodriguez-Fernandez, but before the sweeping changes wrought by IIRIRA, the INA was amended several times. As a result of one of these amendments, a new section, 8 U.S.C. § 1226(e), was added in 1990. See Pub.L. No. 101-649, 104 Stat. 4978, 5050 (1990). It is this statutory provision which the INS argues governs the continued detention of Petitioner Ho. Former 8 U.S.C. § 1226(e) provided:

> (e) Custody of alien
> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction.
> (2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition described in section 1253(g) of this title exists.
> *1054 (3) If the determination described in paragraph (2) has been made, the Attorney General may release such alien only after--
> (A) a procedure for review of each request for relief under this subsection has been established,
> (B) such procedure includes consideration of the severity of the felony committed by the alien, and
> (C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

8 U.S.C. § 1226(e) (1991).

Ho contends that former § 1226(e) governs the continued detention of excludable aliens who have been convicted of aggravated felonies [FN6] only during the period of time prior to the entry of a final determination of excludability. Because a final order of exclusion has been entered against him, Ho argues that the Attorney General has no authority under former § 1226(e) to continue to detain him. He contends his continued detention is governed solely by former 8 U.S.C. § 1227 (1994), a statute essentially identical to that found by this court in Rodriguez-Fernandez to not authorize indefinite detention after entry of a final order of exclusion. This court must, as a threshold matter, resolve the question whether former 8 U.S.C. § 1226(e) governs the continued detention of excludable aliens who have been convicted of aggravated felonies and who have received final orders of exclusion. Because we answer that question in the affirmative, we must then determine whether former § 1226(e) confers on the Attorney General a power this court has concluded she does not have under former 8 U.S.C. § 1227, i.e., the authority to indefinitely detain an excludable alien who has been convicted of an aggravated felony and who cannot be deported within a reasonable amount of time.

> FN6. Ho was convicted of an aggravated felony. See 8 U.S.C. § 1101(a)(43)(G) (1994).

Both the Ninth and Fifth Circuit Courts of Appeal

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have interpreted former 8 U.S.C. § 1226(e) to authorize the Attorney General to continue to detain an excludable alien after a final exclusion order has been entered. See Gisbert v. United States Attorney General, 988 F.2d 1437, 1446 (5th Cir.1993); Alvarez-Mendez v. Stock, 941 F.2d 956, 962 (9th Cir.1991). In what was then a case of first impression, the Ninth Circuit analyzed both former § 1226(e) and former 8 U.S.C. § 1252(a)(2) (1994), the statute that governed the continued detention of deportable aliens. [FN7] See Alvarez- Mendez, 941 F.2d at 961. The Ninth Circuit concluded that former § 1252(a)(2) required the Attorney General to continue to detain a deportable alien who had been convicted of an aggravated felony both before and after entry of the final determination of deportability. See id. That court then specifically rejected the interpretation of § 1226(e) advanced by Ho, concluding that such an interpretation would result in an "irrational distinction" between excludable and deportable aliens; the Attorney General would be required to detain deportable aliens convicted of aggravated felonies both before and after a final determination of deportability but would be required to release excludable aliens who had been convicted of an aggravated felony after entry of the final order of exclusion. See id.

> FN7. Before the enactment of IIRIRA, aliens ineligible for admission into the United States were designated "excludable" aliens. See 8 U.S.C. § 1182 (1994). These individuals are now referred to as "inadmissible" aliens. See 8 U.S.C. § 1182. Aliens who had gained admission into the United States were designated "deportable" aliens. See 8 U.S.C. § 1251 (1994). Proceedings to remove both inadmissible and deportable aliens are now referred to as "removal proceedings." See 8 U.S.C. § 1229a. Under the prior version of the INA, Petitioner Ho was an excludable alien and Petitioner Nguyen was a deportable alien.

In the case of a dangerous alien subject to exclusion proceedings, however, [petitioner] interprets sections 1226 and 1227 to require the Attorney General to detain *1055 the alien while exclusion proceedings are pending, but to release him once a final order of exclusion is entered, unless the Attorney General can effect the alien's removal immediately. Not only would this distinction undermine Congress' attempt to protect society from dangerous aliens, it would be contrary to accepted tenets of U.S. immigration law, which treat aliens subject to deportation more favorably than those seeking initial admission.

The only logical interpretation of section 1226(e) is that it both requires the Attorney General to detain aliens convicted of aggravated felonies pending a determination of their excludability, and provides that where deportation of an alien found excludable cannot be immediate, the Attorney General may release [the alien] only if doing so will not endanger society.

Id. at 961-62 (footnote omitted).

[6] We find the reasoning in Alvarez-Mendez persuasive and now join the Ninth and Fifth Circuits in interpreting former 8 U.S.C. § 1226(e) to authorize the Attorney General to continue to detain an excludable alien who has been convicted of an aggravated felony after the entry of a final order of exclusion.

Former § 1226(e) is not ambiguous concerning the Attorney General's discretion to indefinitely detain an excludable alien whose deportation cannot be expeditiously accomplished. The statute is framed not as a grant of authority to detain the alien, but as a limitation on the Attorney General's power to release the alien from detention. If the alien cannot be deported because his country of origin refuses to accept him, the statute expressly prohibits the Attorney General from releasing the alien unless, upon review of the alien's request for relief, it is determined that the alien "will not pose a danger to the safety of other persons or to property." 8 U.S.C. § 1226(e) (1994). The statute imposes no time limit on its restriction of the Attorney General's power to release the alien and this court will not read a time limit into the statute. Cf. Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 939 (10th Cir.1996) ("Where statutory language is clear and unambiguous, that language is controlling and courts should not add to that language.").

[7] The statutory scheme analyzed by this court in Rodriguez-Fernandez did not include former 8 U.S.C. § 1226(e), the statute applicable to the case at bar. The most reasonable interpretation of former § 1226(e) compels the conclusion that the Attorney General must continue to detain, after entry of a final order of exclusion, an excludable alien who has been convicted of an aggravated felony unless a review of the alien's request for relief concludes that the alien does not pose a danger to the safety of

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other persons or to property. Ho is an excludable alien who has been convicted of an aggravated felony. Acting on Ho's request for relief from continued incarceration, the Attorney General has concluded that Ho poses a danger to the safety of other persons or to property, a determination not challenged by Ho and thus not addressed herein. Pursuant to former § 1226(e), therefore, the Attorney General may not release Ho from detention and is statutorily obligated to continue to detain him indefinitely.

2. No. 99-1182

The INS maintains that the question of Nguyen's continued detention is governed by 8 U.S.C. § 1231(a)(6) and Nguyen does not dispute this position. This court will, therefore, analyze Nguyen's statutory claims under § 1231(a)(6). [FN8]

FN8. 8 U.S.C. § 1231(a)(6) was added to the INA by IIRIRA § 305(a)(3). Arguably, 8 U.S.C. § 1252 (1994), the statute in effect at the time deportation proceedings were commenced against Nguyen may govern Nguyen's continued detention. But see Zadvydas v. Underdown, 185 F.3d 279, 287 & 286 n. 7 (5th Cir.1999) (determining that the effective-date provision of IIRIRA is ambiguous and concluding that IIRIRA applies to aliens who had received final removal orders before IIRIRA's effective date). Former § 1252(a)(2)(B) was added to the Code in 1991 and provided:

The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

8 U.S.C. § 1252(a)(2)(B) (1994).

By its express terms, this statute applies to aliens like petitioner, Nguyen, who were formerly classified as "deportable." See id.; see also Gisbert v. United States Attorney General, 988 F.2d 1437, 1445 (5th Cir.1993) (concluding that former 8 U.S.C. § 1252(a)(2)(B) allows the Attorney General to indefinitely detain deportable aliens). Additionally, Nguyen was convicted of an aggravated felony. See 8 U.S.C. § 1101(a)(43)(G) (1996). Arguably, former § 1252(a)(2)(B) requires the Attorney General to indefinitely detain a deportable alien convicted of an aggravated felony who cannot demonstrate he is not a threat to society or likely to abscond. Because neither party has raised the issue, however, we do not decide whether this statute governs Nguyen's continued detention or whether the permanent provisions of IIRIRA apply to aliens who received final removal orders before IIRIRA's effective date.

***1056** Pursuant to 8 U.S.C. § 1231(a)(1)(A), once an alien is ordered removed, the Attorney General "shall remove the alien from the United States within a period of 90 days." This ninety-day period is referred to in the statute as the "removal period." See 8 U.S.C. § 1231(a)(1). Although the statute contains the ostensibly unequivocal language "shall remove," it begins with the qualifying language, "[e]xcept as otherwise provided in this section." Id. The statute, thus, expressly contemplates that the Attorney General may be unable to remove certain aliens within the removal period. At least one qualifying provision referenced in § 1231(a)(1)(A) is found at 8 U.S.C. § 1231(a)(6). Specifically, § 1231(a)(6) provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney general to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

[8] The INS asserts that § 1231(a)(6) is unambiguous and confers on the Attorney General the statutory authority to indefinitely detain an alien who cannot be removed during the removal period if that alien has been found to be a risk to the community or unlikely to comply with the removal order. Nguyen, however, argues that § 1231(a)(6) is ambiguous and no more authorizes indefinite detention than the statute interpreted by this court in Rodriguez-Fernandez.

Nguyen's contention that 8 U.S.C. § 1231(a)(6) is indistinguishable from the statute interpreted by this court in Rodriguez-Fernandez is without merit. Unlike the ambiguous statute analyzed in Rodriguez-Fernandez, § 1231(a)(6) is not ambiguous. It expressly allows the Attorney General, in her discretion, to continue to detain the following removable aliens beyond the ninety-day removal period: (1) those who are inadmissible under 8 U.S.C. § 1182; (2) those who are removable under 8 U.S.C. § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4); and (3) those who she determines would be a flight risk or a risk to the community if released. See 18 U.S.C. § 1231(a)(6); accord Chi Thon Ngo v. Immigration & Naturalization Serv., 192 F.3d 390, 394-95 (3rd Cir.1999).

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Nguyen was convicted of an aggravated felony and, therefore, is removable under 8 U.S.C. § 1227(a)(2). See 8 U.S.C. § 1101(a)(43)(G). Additionally, the Attorney General has determined that Nguyen is a risk to the community and unlikely to comply with the order of removal if released from incarceration. Nguyen does not challenge the Attorney General's determination that he would be a flight risk ***1057** or a risk to the community if he were released from incarceration and this court thus does not address the issue. Consequently, the statute clearly and unambiguously authorizes the Attorney General to detain Nguyen beyond the ninety-day removal period.

[9] Section 1231(a) places no time limit on the continued detention of the aliens whose continued detention it authorizes. Although Nguyen argues this panel must follow the Rodriguez-Fernandez majority and read a reasonable time limit into the statute, that argument is also without merit. In Rodriguez-Fernandez, the majority interpreted an ambiguous statute to authorize the continued detention of an excludable alien only "during a reasonable period of negotiations for [his] return to [his] country of origin...." 654 F.2d at 1389. Because the statute analyzed in Rodriguez-Fernandez was ambiguous, the majority's imposition of a reasonable time limit on continued detention was an essential component of its interpretation of the statute. In stark contrast, 8 U.S.C. § 1231(a)(6) expressly allows for continued detention beyond the removal period with no time limit placed on the duration of such detention. This court will not substitute its judgment for that of Congress by reading into the statute a time limit that is not included in the plain language of the statute. Cf. Pueblo of San Ildefonso, 103 F.3d at 939 ("Where statutory language is clear and unambiguous, that language is controlling and courts should not add to that language."). The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens, Nguyen among them, who cannot be removed within the ninety-day removal period. Accord Chi Thon Ngo, 192 F.3d at 394-95.

D. Constitutionality of Indefinite Detention

[10] Because the applicable statutes allow the Attorney General to indefinitely detain both Ho and Nguyen, it is necessary for this court to address the question of whether such indefinite detention is unconstitutional. Petitioners argue this court is bound by the constitutional analysis in Rodriguez-Fernandez. This argument is unpersuasive. This court's conclusion in Rodriguez-Fernandez that the statute in effect at the time did not authorize indefinite detention was influenced by the majority's belief that any other reading of the statute would raise significant constitutional problems. See Rodriguez-Fernandez, 654 F.2d at 1386. "We dispose of the appeal by construing the applicable statutes to require [petitioner's] release at this time. Nevertheless, it seems important to discuss the serious constitutional questions involved if the statute were construed differently." Id.; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (reiterating that "it is beyond debate" that courts must construe statutes to avoid constitutional problems unless such construction is plainly contrary to Congress' intent). The Rodriguez-Fernandez majority, however, did not purport to definitively answer the constitutional questions raised; its statutory interpretation was aided, not compelled, by its constitutional analysis. The majority held that the statute did not authorize indefinite detention. See 654 F.2d at 1389-90. It did not hold that indefinite detention is unconstitutional. Thus, any discussion of the constitutionality of indefinite detention in Rodriguez-Fernandez is dicta and is not binding on this panel. See Bates v. Dep't of Corrections, 81 F.3d 1008, 1011 (10th Cir.1996) ("[A] panel of this Court is bound by a holding of a prior panel of this Court but is not bound by a prior panel's dicta.").

[11][12][13][14][15][16] The Due Process Clause of the Fifth Amendment provides, in pertinent, ***1058** part that "[n]o person shall ... be deprived of ... liberty ... without due process of law." U.S. Const. Amend. V. The due process protection of the Fifth Amendment has two components, a substantive

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due process component and a procedural due process component. See United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The substantive due process component precludes the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." Id. (citations and quotations omitted). The procedural due process component precludes the government from depriving a person of life, liberty, or property in an unfair manner. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Substantive and procedural due process claims must be supported by an underlying liberty interest. See Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir.1998). A liberty interest can arise in one of two ways: (1) from the Due Process Clause itself; or (2) from a state or federal statute. See id. Any due process analysis must begin with a "careful description of the asserted right." Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Petitioners do not challenge the Attorney General's power to deport them or her power to detain them for a reasonable time until they can be physically removed from this country. Petitioners, instead, claim that because their country of origin refuses to accept them, their continued detention is indefinite, and possibly permanent and thus constitutes punishment without a criminal trial. Petitioners assert that they have a liberty interest, arising from the Due Process Clause itself, in being free from this type of incarceration. Petitioners, however, fundamentally mischaracterize the true nature of the right they are asserting.

Petitioners are subject to final removal orders and the only step in the removal process remaining to be accomplished is the execution of the removal orders effectuating Petitioners' physical expulsion from this country. Any right either Petitioner had to remain in this country was extinguished when their removal orders became final. See 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p) (1999) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.")

If their habeas petitions are granted, Petitioners will be awarded the very right denied them as a result of the final orders of removal, i.e., the right to be at large in the United States. Although the petitions could be characterized as requests to be released from incarceration, the relief they seek is indistinguishable from a request to be readmitted to this country, albeit temporarily, until their return to Vietnam can be effectuated. The purported liberty interests at stake in these cases, therefore, are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and who is subject to indeterminate detention because his country of origin will not accept his return.

[17][18][19] It is well-settled that aliens who are physically present in this country but who are not lawful permanent residents are entitled to some of the protections afforded by the Fifth Amendment. See Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."). The Supreme Court, however, "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or *1059 exclude aliens is a sovereign prerogative." Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S.Ct. 309, 94 L.Ed. 317 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). Although Petitioners have been continually present in this country since they were admitted as refugees, physical presence alone does not confer heightened constitutional rights on an alien seeking admission to this country. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213, 73 S.Ct. 625, 97 L.Ed. 956 (1953). Consequently, while aliens physically present in the United States are clearly "persons" afforded some Fifth Amendment rights, they have no constitutional rights regarding their application for admission.

[20] Petitioners have been ordered deported and those orders are final. The final removal orders

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stripped both Ho and Nguyen of any heightened constitutional status either may have possessed prior to the entry of the final removal order. Like an alien seeking initial entry, Petitioners have no right to be at large in the United States. As a consequence of their final removal orders, and notwithstanding their physical presence in this country, Ho and Nguyen have no greater constitutional rights with respect to their applications for admission than an alien seeking to enter this country for the first time. Cf. id. ("For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.").

Nguyen, however, argues that he possesses greater constitutional rights than excludable aliens because of his former status as a lawful permanent resident. Nguyen's argument was recently considered and rejected by the Fifth Circuit Court of Appeals. See Zadvydas, 185 F.3d at 294-97. Acknowledging that a resident alien is entitled to greater procedural due process rights during removal proceedings than those accorded excludable aliens, that court nevertheless concluded that once a removal order has become final and the only act remaining to be carried out is the actual expulsion of the alien, no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens. See id. The Fifth Circuit analyzed several Supreme Court cases and concluded, "Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien." Id. The Fifth Circuit could find no distinction between the right to release from continued incarceration asserted by a deportable alien subject to continued detention pending deportation and the same right asserted by an excludable alien subject to the same continued detention. See id. at 295-96. Further, that court found no distinction between the government's interest in expelling a deportable alien and its interest in expelling an excludable alien. See id. at 296.

[21] We have found no case, and none was brought to our attention by Nguyen, in which either the Supreme Court or a court of appeals has held that a deportable alien subject to a final order of deportation and being detained by the United States pending that deportation possesses greater constitutional rights than an excludable alien in the same position. The Fifth Circuit's analysis was comprehensive and we find it persuasive. We conclude that once a removal order has become final and an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his *1060 application for admission as an excludable alien.

Both Petitioners are properly characterized as inadmissible aliens seeking temporary entry into the United States. Notwithstanding their physical presence in this country, they have no constitutional rights regarding their application for entry. See Plasencia, 459 U.S. at 32, 103 S.Ct. 321. Hence, the Due Process Clause does not provide Petitioners a liberty interest in the right they assert, i.e., the right to be temporarily admitted into this country. Furthermore, Petitioners do not contend the statutes that authorize their continued detention or any other existing state or federal law or regulation creates a liberty interest in being temporarily admitted into the United States. [FN9]

FN9. Even if Petitioners had argued that either former 8 U.S.C. § 1226(e) (1994), 8 U.S.C. § 1231(a)(6) or some other law or regulation created such a liberty interest because it allows the Attorney General to release them from detention if she determines that they are no longer a flight risk or a risk to society, it is unclear whether such a law or regulation would create a liberty interest. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (holding that no liberty interest is created by a statute that allows the decision-maker to deny the requested relief with unfettered discretion); Velasco- Gutierrez v. Crossland, 732 F.2d 792, 797 (10th Cir.1984) (holding that no liberty interest was created by INS internal operations instructions); 8 U.S.C. § 1252(a)(2)(B)(ii) (barring judicial review of the Attorney General's discretionary decisions).

Petitioners have not demonstrated that they have a liberty interest in the temporary entry they seek arising either under the Due Process Clause or from a state or federal statute or regulation. Accordingly, Petitioners' substantive and procedural due process

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claims fail. See Fristoe, 144 F.3d at 630.

III. CONCLUSION

The applicable statutes authorize the continued, indefinite detention of both Petitioners. Because Petitioners have no liberty interest in the right they are asserting, their due process claims fail. Consequently, there is no constitutional impediment to Petitioners' continued detention. The judgment of the district court in No. 98-1333 is reversed and the case is remanded to the district court with instructions to revoke Petitioner Ho's bond and for any further proceedings consistent with this opinion. The judgment of the district court in No. 99-1182 is reversed and the case remanded to the district court with instructions to revoke Petitioner Nguyen's bond and for any further proceedings consistent with this opinion. The mandate shall issue forthwith.

BRORBY, Circuit Judge, dissenting.

I agree with the majority's well-reasoned resolution of the threshold jurisdictional issue. I further agree the plain language of the applicable statutes, former 8 U.S.C. § 1226(e) (1994) and current 8 U.S.C. § 1231(a)(6), authorizes the Attorney General to detain Petitioners indefinitely pending execution of the final removal order. I must depart from the majority's analysis at that point, however, because the indefinite detention of Petitioners Ho and Nguyen may well violate the substantive due process rights I believe the Fifth Amendment of the United States Constitution affords them, in a manner that shocks the conscience. For that reason, I would remand this matter to the district court for additional factual findings in accordance with the analysis presented below.

The majority avoid the crucial constitutional issue this case presents by preemptively concluding that Petitioners "fundamentally mischaracterize the true nature of the right they are asserting." According to the majority, "[b]oth Petitioners are properly characterized as inadmissible aliens seeking temporary entry into the United States." As shown below, it is the majority, not the Petitioners, who mischaracterize *1061 the fundamental rights at stake in this case.

Petitioners plainly assert that their continued, indefinite detention pending removal amounts to impermissible punishment and therefore violates the liberty rights they have as "persons" protected under the Due Process Clause of the Fifth Amendment to the United States Constitution. The majority disregard this claim, reasoning, without the support of authority, that "[t]he final removal orders stripped both Ho and Nguyen of any heightened constitutional status either may have possessed prior to the entry of the final removal order." On that basis, the majority conclude "[t]he purported liberty interests at stake in these cases ... are most appropriately viewed from the perspective of an alien who has sought but been denied initial entry into this country and who is subject to indeterminate detention because his country of origin will not accept his return." Narrowing its analysis to the perspective of an alien seeking initial admission to the United States, the majority permits our government to detain Petitioners indefinitely, even permanently, with no constitutional recourse (" 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application' " (quoting Landon v. Plasencia, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982))).

Close analysis reveals that the majority's treatment of Petitioners' constitutional claims is supported only by a tenuous foundation of legal fiction stacked upon legal fiction. In order to characterize Petitioners as aliens seeking admission, the majority must first equate the removal order itself with an actual physical exit from the country. Having made that leap, the majority adopt the "entry fiction" applied in admission cases so as to characterize immigrants who are physically present within United States borders pending a determination of admission as never having effected entry into this country and therefore not entitled to due process protection. See Plasencia, 459 U.S. at 32-33, 103 S.Ct. 321. Compounding these fictions is the majority's unsupported conclusion that while Petitioners resided in the United States they may have enjoyed some form of "heightened" constitutional status that could be stripped away upon the issuance of a removal order. Finally, to avoid the constitutional prohibition against imprisonment for purposes other than punishment, the majority employs the fiction that detention is merely an extension of the exclusion proceedings, and therefore within the plenary power of the executive and legislative branches to govern immigration matters.

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In my view, this fictional foundation the majority construct as a barrier to Petitioners' constitutional claims collapses under the ground floor constitutional principal that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); see also, Plasencia, 459 U.S. at 32, 103 S.Ct. 321 ("[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); Rodriguez-Fernandez, 654 F.2d at 1387-88 (" 'There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime.' " (quoting Petition of Brooks, 5 F.2d 238, 239 (D.Mass.1925))). Petitioners entered the United States as refugees in the 1980s and have lived in this country for over fifteen years. They have not exited the country and do not seek entry or readmission, temporary or otherwise. Thus, regardless of their status under the removal orders, in the most real *1062 sense Petitioners continue to be "persons" who enjoy basic constitutional rights.

Liberty is one of those basic rights enjoyed by all "persons," as "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). Any infringement of this right, in the absence of incarceration pending trial or other disposition of a criminal charge (i.e., punishment), is subject to strict scrutiny--the infringement must be "narrowly tailored to serve a compelling state interest." [FN1] See Reno v. Flores, 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); United States v. Salerno, 481 U.S. 739, 747, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The appropriate strict scrutiny analysis is set forth in Salerno, which instructs that we must first determine whether the detention is intended as punishment or for a legitimate regulatory purpose. If the detention is intended as legitimate regulation, we must determine whether it is "excessive in relation to the regulatory purpose Congress sought to achieve." 481 U.S. at 747-48, 107 S.Ct. 2095.

FN1. I agree with the District Court for the Western District of Washington in its rejection of the government's argument that because the legislative and executive branches possess "plenary power" over immigration and naturalization, see Flores, 507 U.S. at 305-06, 113 S.Ct. 1439, courts should apply a more deferential standard of review. As that court noted:

> While the plenary power doctrine supports judicial deference to the legislative and executive branches on substantive immigration matters, such deference does not extend to post-deportation order detention. Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress's directives. The dangers at which the detention scheme is directed, chiefly the prevention of flight and the protection of the community pending deportation of aliens who have been convicted of crimes, involve domestic interests rather than international concerns.

Phan v. Reno, 56 F.Supp.2d 1149, 1155 (W.D.Wash.1999).

The answer to the first question is clear. No one asserts Petitioners are being detained as punishment. Each has served his sentence(s) for the crime(s) committed. Furthermore, deportation and immigration detention are not considered punishment. See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984); Zadvydas, 185 F.3d at 296; Phan, 56 F.Supp.2d at 1155 n. 7. We are therefore left to determine what regulatory purpose is being served and whether the detention is excessive in relation to that purpose.

As a number of district courts dealing with this difficult issue in the first instance have recognized, the critical inquiry in these cases is whether an alien's detention is excessive in relation to the government's legitimate regulatory interest in (1) ensuring the safe removal of aliens ordered deported; (2) preventing flight prior to deportation; and (3) protecting the public from dangerous felons. See Vo v. Greene, 63 F.Supp.2d 1278, 1282-83 (D.Colo.1999); Phan, 56 F.Supp.2d at 1155-56; Hermanowski v. Farquharson, 39 F.Supp.2d 148, 159 (D.R.I.1999); see also 8 U.S.C. § 1231(a)(6). In evaluating the scope of the detention in relation to the government's regulatory interest,

> we must necessarily balance the likelihood that the government will be able to effectuate deportation,

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against the dangerousness of a petitioner and the likelihood that he will abscond if released. In so doing, it becomes clear that as the probability that the government can actually deport an alien decreases, the government's interest in detaining that alien becomes less compelling and the invasion into the alien's liberty more severe. Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, *1063 it is "excessive" to detain an alien indefinitely if deportation will never occur.
Phan, 56 F.Supp.2d at 1156. [FN2]

FN2. This circuit and others have used similar balancing frameworks when reviewing other types of administrative detention. See, e.g., United States v. Theron, 782 F.2d 1510 (10th Cir.1986); United States v. Hare, 873 F.2d 796 (5th Cir.1989); United States v. Gelfuso, 838 F.2d 358 (9th Cir.1988).

Because I do not accept the premise that Petitioners have no liberty rights at stake, I would apply this balancing framework to evaluate each Petitioner's substantive due process claim. [FN3] The likelihood of deportation, dangerousness and the likelihood of flight clearly are factual inquiries unique to each case. The district court did not undertake such an inquiry, but instead relied on this court's decision in Rodriguez-Fernandez to grant the writs. As the majority point out, Rodriguez-Fernandez does not strictly control this case. Consequently, I would remand these matters to the district court to apply the balancing framework in the first instance, considering all facts relevant to evaluating the scope of detention in relation to the government's legitimate regulatory purpose.

FN3. I agree with that portion of the majority's and Fifth Circuit's analysis that concludes there is no difference, under the circumstances presented here, between the right to release from continued incarceration asserted by an excludable versus a deportable alien, see Maj. Slip Op. at ---- - ----; Zadvydas, 185 F.3d at 294-96. Mr. Ho and Mr. Nguyen assert the same fundamental constitutional right, and the government's interest in removing each is the same. See Zadvydas, 185 F.3d at 295. Courts which have found the distinction between deportable and excludable aliens relevant in this context, see Vo, 63 F.Supp.2d at 1282-83; Phan, 56 F.Supp.2d at 1153-54; Hermanowski, 39 F.Supp.2d at 157-58, appear to have done so as a means to avoid application of the entry fiction doctrine to deny constitutional rights to deportable aliens (i.e., aliens who once were lawful permanent residents). The strict scrutiny analysis I propose would eliminate the need for such a distinction in order to protect the constitutional rights of aliens who the United States government is unable to deport.

In sum, I emphasize that the sovereign power of the political branches of government to detain and remove aliens simply is not without limit--it must not run afoul of the Fifth Amendment's guarantee that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The substantive component of this due process guarantee protects against governmental interference with those rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 324-25, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and prohibits governmental conduct that "shocks the conscience." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The majority cannot dispute that Petitioners Ho and Nguyen were "persons" under the Constitution for over fifteen years. Ordered liberty does not allow for the use of legal fictions to strip any human being of his status as a "person" under the United States Constitution in order to justify indefinite imprisonment pending completion of the regulatory process of removal. Governmental conduct that so reduces an individual to a "non-person" to permit such imprisonment without any attempt to scrutinize the scope of the detention by balancing the likelihood that the government will be able to effectuate deportation against a petitioner's dangerousness and the likelihood that he will abscond if released most assuredly shocks my conscience. I therefore dissent.

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